

FILED

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

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CENTRAL DIVISION

DISTRICT OF UTAH

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SUMMIT TECHNOLOGIES OF ARIZONA, )  
a Utah corporation d/b/a/ CETEC;  
and WILLIAM L. VETTER, an )  
individual, )

Case No. 2:03-CV-00799-DS  
BY: \_\_\_\_\_

Plaintiffs, )

vs. )

MEMORANDUM DECISION  
AND ORDER

WEBSTER ASSOCIATES, INC., a  
Colorado corporation; JAMES W. )  
TATMAN, an individual; BRENT  
TATMAN, an individual; TED DENT,  
an individual; BENJAMIN )  
BLANCHARD, an individual; NORMAN  
KLIMEK, an individual; and DOES )  
1-10,  
Defendants. )

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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 12(b)(3), Defendants move the court to dismiss plaintiffs' complaint for improper venue. In the alternative, Defendants request that the case be transferred to the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1404(a).<sup>1</sup>

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<sup>1</sup>The court, having reviewed the briefing submitted by the parties, will rule on the motions without the assistance of oral

Plaintiff Summit Technologies of Arizona ("Summit") is alleged to be a Utah corporation doing business as Cetec. Plaintiff William Vetter ("Vetter") is alleged to be a resident of Utah. Vetter is the sole shareholder, director and officer of Summit. Defendant Webster Associates, Inc., is alleged to be a Colorado corporation. Webster currently maintains a sales office in Salt Lake City, Utah. The individual defendants are alleged to be shareholders of Webster and residents of Colorado. Both Webster and Summit are involved in selling and marketing of filtration products used in the pharmaceutical industry. Plaintiff's have filed this diversity action against defendants for breach of contract and other claims allegedly arising out of, or related to, the purported sale of Cetec to Defendant Webster.

## II. DISCUSSION

### **A. Venue**

Pursuant to Fed. R. Civ. P. 12(b)(3), Defendants move the court to dismiss this action for improper venue. In a diversity action, venue is assessed under 28 U.S.C. § 1391 (a), which

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argument, pursuant to DUCivR 7-1(f).

provides that a civil action may be brought only in

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Plaintiffs claim venue is proper in the District of Utah under § 1391(a)(2) "as the contract between the parties was entered into in the State of Utah, [and] the business which is the subject of the dispute is located in the State of Utah". (Amed. Compl. at p. 2). Defendants in similarly conclusory fashion assert that "substantially all of the contact between Defendants and Plaintiff Vetter concerning this transaction occurred in the State of Colorado." (Mem. Supp. at 3).

In support of their position Defendants have filed affidavits stating generally and in conclusory fashion that Vetter approached Webster in Colorado and that all formal dealings regarding this matter occurred in Colorado. Vetter, on the other hand, has filed his affidavit stating that representatives of Webster approached him in Utah with a request to purchase Cetec, and that most negotiations concerning the alleged sale were via telephone, email

and letters sent between Utah and Colorado. These general assertions are in dispute.

In addressing this matter, the court is guided by the following standard of review.

The procedure to deciding a motion to dismiss for improper venue is generally the same as for deciding a motion to dismiss for lack of personal jurisdiction. Phoenix Canada Oil Co., Ltd. v. Texaco, Inc. 78 F.R.D. 445, 452 (D. Del. 1978). When a motion to dismiss for lack of jurisdiction is brought before trial and supported by affidavits and other written material, plaintiff need only make a prima facie showing of jurisdiction. Taylor [Taylor v. Phelan, 912, F.2d 429 (10<sup>th</sup> Cir. 1990), cert. denied, 498 U.S. 1068 (1001)], 912 F.2d at 431; Federal Deposit Ins. Corp. v. Oaklawn Apartments, 959 F.2d 170, 174 (10<sup>th</sup> Cir. 1992). In assessing whether plaintiff has met its burden, allegations in the complaint that are uncontroverted by defendant's affidavits must be taken as true and all factual disputes should be resolved in favor of plaintiff. Taylor, 912 F.2d at 431.

M.K.C. Equipment Co., Inc. v. M.A.I.L. Code, Inc., 843 F. Supp 679, 682-83 (D. Kansas 1994).

Because the underlying facts of where plaintiff's alleged claims arose are in dispute, the court at this juncture, resolves those disputes in favor of Plaintiffs. Accordingly Defendants' motion to dismiss for improper venue is denied.

C. 28 U.S.C. § 1404(a) Transfer

In the alternative, Defendants request that this case be transferred to the United States District Court for the District of Colorado pursuant 28 U.S.C. § 1404(a). "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). In evaluating a motion to transfer, the court considers the following.

"Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 2244, 101 L. Ed.2d 22 (1988) (quoting Van Dusen, 376 U.S. at 622, 84 S. Ct. at 812).

Among the factors [a district court] should consider is the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical.

Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1967).

Chrysler Credit Corp. v. Country Chrysler Inc., 928 F.2d 1509, 1516 (10th Cir. 1991).

In this case, no factor standing alone is determinative. As master of the complaint, deference is given to plaintiff's forum selection. Frontier Federal Sav. & Loan Ass'n v. National Hotel Corp., 675 F. Supp. 1293, 1301 (D. Utah 1987). On the other hand, Defendants named anticipated witness all reside in Colorado. If this matter proceeds to trial in Utah, those witnesses cannot be compelled to appear. Plaintiffs' named witnesses neither reside in Utah or Colorado, but in New Jersey, New York, North Carolina and California. Because they cannot be compelled to appear, their convenience is not at issue, as they will be inconvenienced in either Utah or Colorado. Although Plaintiffs allege that Webster maintains a sales office in Salt Lake City and that given Webster's "wealth", trial in Utah would not prejudice Defendants, there is no evidence before the court of any significant hardship, financial or otherwise, if this case is transferred to Colorado. The court further notes that Vetter, the sole shareholder, director and officer of Summit/Cetec, also alleges that he is or was a shareholder of Webster, that he serves or served on Webster's Board of

Directors, and that he attended no fewer than three Webster Board meetings in Colorado. Additionally, Plaintiffs have alleged liability on the part of the individual defendants, several of whom have asserted by affidavit that they have not subjected themselves to personal jurisdiction in Utah and that they will move to dismiss this action against them individually if it remains in Utah. These individual defendants are alleged to be key witness for Webster. Finally, Plaintiffs admit that this action could have been filed in Colorado.

After carefully considering the written memoranda of the parties and applicable law, the court is persuaded that the totality of the circumstances of this case weigh in favor of transfer.

### III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendants' motion to dismiss for improper venue is **DENIED**, and Defendants alternative motion to transfer this matter to the District of Colorado is **GRANTED**. The Clerk of the Court is requested to transfer this matter to the United States District

Court for the District of Colorado.

DATED this 13<sup>th</sup> day of January, 2004.

BY THE COURT:

A handwritten signature in black ink, appearing to read "David Sam", is written over a horizontal line.

DAVID SAM  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT



United States District Court  
for the  
District of Utah  
January 14, 2004

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:03-cv-00799

True and correct copies of the attached were either mailed, faxed or e-mailed  
by the clerk to the following:

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